

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA**

Alexandria Division

UNITED STATES OF AMERICA)	
)	
vs.)	Case No.: 1:21-CR-234
)	
)	
ROSE-MARIE NSAHLAI,)	Court Date: February 27, 2023
)	through March 2, 2023
Defendant.)	

**DEFENSE SUPPLEMENTAL TRIAL BRIEF;
AND REPLY TO GOVERNMENTS RESPONSE FILED ON 2/23/23**

The Defense respectfully submits this supplemental Trial Brief and Reply to
Government's Response (original Trial Brief submitted on 2/21/23).

1. Based on the exhibits being offered and the anticipated witness testimony, the defense objects to the admission of all electronic communications associated with Mr. Kindambu, Mr. Amankwah and Ms. Nsahlai

a. Chain of Custody/Authenticity

The Government intends to offer into evidence a substantial amount of electronic communications in the form of emails and message communications relating to the three individuals noted above. With regard to the emails, upon information and belief, the Government is apparently relying on a process by which it obtained access to an online folder from an email sent to Oath Holdings, Inc. An online folder was then forwarded to Agent Sublett who forwarded it to Special Agent Nash. She then downloaded the folder, and separated it into two subfolders based on an analysis of what may have been "privileged." Her created folders were then copied by Special Agent Erwin, who then transferred them to a hard drive, which the government used to produce its proposed exhibits. There is no indication or offering of exactly

how Oath Holdings, Inc., a private company, archives its data; so information relating to who has access to it, who handles transferring the data to different "cloud" spaces over time, what security measures are undertaken to ensure no data is accessed by unauthorized entities, how the integrity of the data is maintained and/or how often its files have been jeopardized, hacked, corrupted and/or subject to viruses or any other negative impact. While this would be much easier to address if the Government were producing any participants in the communications, apparently they are not intending to do so. Accordingly, these other issues must be addressed before the Government may try to move this information into evidence.

The Government is also offering into evidence WhatsApp message communications concerning the same individuals. Upon information and belief, these communications were produced by obtaining a cell phone that was one of five that apparently Didier Kindambu owned. The chain of custody with regard to that recovery is not adequately established. It was left at his house after he was arrested, and remained there for a substantial period of time (it is believed to be months). He had given his password to the phone to his daughter and son, and the phone was not secured in any way. In addition to any other individuals who may have had access to the phone over that extended period of time, his children's Aunt was living with them. The phone then passed from Kindambu's daughter, to his attorney, to Special Agent Baker, to Special Agent Erwin. She then performed an extraction using a "Grayshift device." The information sought to be introduced by the Government is based on Cellebrite software, which software has a known potential drop-out of data under certain circumstances. Nonetheless, there is no proposed expert to testify regarding what a "Grayshift device" is or about Cellebrite, and how and why people should rely on the produced data as being accurate. As with the emails described above, this issue is much easier to address if the Government were producing any participants in the

communications, apparently they are not intending to do so. Accordingly, these other issues must be addressed before the Government may try to move this information into evidence.

For these reasons, the communications should be excluded.

b. Foundation

As noted above, the Government is not intending to produce any of the witnesses who participated in the electronic communications it seeks to offer into evidence. There will be no one to verify that he or she was actually the one who sent or received the communication. There are a number of ways a communication may not on its face reflect accurately who sent or received it.

For these reasons also, the communications should be excluded.

c. Marital Privilege

For the reasons previously stated, on this basis also, the communications involving Ms. Nsalai and Mr. Kindambu should be excluded.

2. If the Court allows any of the electronic communications involving Kindambu, Amankwah and Ms. Nsahlai, the WhatsApp message chain is admissible for the reasons previously stated.

To supplement the previous arguments to the court, it should be noted that there is no issue as to whether it is "relevant." The Government itself noted in its response (footnote 1) that "[t]he Government may offer the statements as non-hearsay co-conspirator statements made during and in furtherance of the conspiracy" Despite seemingly arguing to the contrary, the Government apparently concedes this point.

3. In order to avoid multiple subpoenas, the Defense has relied on the Government's subpoenas relating to their anticipated witnesses. Accordingly, the Defense requests that the Government not excuse any witness without first checking with counsel as to whether the witness is needed.

Respectfully Submitted,

ROSE-MARIE NSAHLAI
By Counsel

WE ASK FOR THIS:

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CERTIFICATE OF SERVICE

I hereby certify that on or before the 24th day of February, 2023, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to all parties of record.

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